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CITATIONS

775562—48

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 523

ARTHUR SHILMAN, PETITIONER

v.

THE UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION AND GRACE LINE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of New York (R. 41–43) is reported at 1947 A. M. C. 928. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 52–58) is not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals for the Second Circuit was entered December 4, 1947 (R. 59). The petition for a writ of certiorari was filed January 12, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner, a civil service employee of the United States, may recover wages earned while employed as a seaman aboard a government vessel in a suit against respondent which acted as agent of its disclosed principal, the United States, in the conduct of certain business of the vessel.

STATEMENT

Respondent Grace Line, Inc., was a ship's husband or general agent appointed by the United States under the standard form of agreement to manage the accounting and other shoreside business of the S. S. *Eli Whitney* and other vessels owned and operated by the United States through the War Shipping Administration.[1] This suit was originally brought by petitioner against the United States of America and the War Shipping Administration as well as against the present respondent Grace Line, Inc., alleging them to be jointly and severally liable for the sum of $200.00 wages due him (R. 2–5). It alleged that these three parties "owned, operated, controlled and managed a certain vessel known as the S. S. *Eli Whitney*" (R. 2–3), that petitioner was employed by them as a seaman in the service of that vessel and "signed regular merchant shipping articles

[1] War Shipping Administration Form GAA 4–4–42, 7 Fed. Reg. 7561, 7562; 46 C. F. R., 1943 Cum. Supp., p. 11427, sec. 306.44.

for a voyage aboard said vessel in the capacity of wiper" (R. 3). It further alleged that the sum of $200.00, owing to petitioner as wages, was paid over to the United States Army by Grace Line, Inc., in payment of a fine of $200.00 levied on petitioner by an Army court martial without his authorization of such payment and without statutory or other authority (R. 4). The United States Attorney filed a joint answer on behalf of all three respondents (R. 5–9) and the case was submitted to the district court on an agreed statement of facts (R. 9–13).[2] That court held that the court martial had jurisdiction of petitioner, that the fine was a debt of petitioner to the United States and his wages an indebtedness of the United States to him, and that they were mutual debts which could be offset against each other; it ordered petitioner's suit dismissed as to all three parties (R. 42–43). On appeal, the court below reversed as to the United States, holding petitioner entitled to recover his wages from it as his employer, but affirmed the dismissal of respondent, its agent (R. 52–59).

The facts which gave rise to petitioner's claim against respondent may be briefly summarized. The S. S. *Eli Whitney* was documented and registered in the name of the United States and was operated in cooperation with the Armed Forces for the purposes of the prosecution of the war in North

[2] The parties stipulated that the War Shipping Administration was not a suable entity (R. 10).

Africa (R. 10). Respondent, Grace Line, Inc., attended to the business of the *Whitney* for the United States in accordance with the standard form of General Agency Agreement (R. 10). Petitioner was employed by the United States aboard the *Whitney* as a seaman in the service of the vessel (R. 10). When so employed, he signed the regular ship's articles for a voyage aboard the *Whitney* in the capacity of wiper in the engine department (R. 10). While so employed from May 25 to August 1, 1943, he earned the net sum of $406.86 (R. 10). On July 31, 1943, while the *Whitney* was at the Port of Tunisia, North Africa, petitioner was arrested by the United States Army, was tried by special court martial for the theft of an adding machine from the French Navy, found guilty and sentenced to pay to the United States a fine of $200.00 and to be confined for three months (R. 11). Petitioner was discharged from the *Whitney* at Bizerte, Tunisia, and the purser offered to pay him the wages then due him less the amount of the fine, but petitioner refused to accept payment (R. 12). Thereafter, about November 10, 1943, a claim by petitioner was submitted for allowance in accordance with the rules and regulations[3] governing seamen's claims under Public Law 17, 78th Congress (Act of March 24, 1943, 57 Stat. 45; 50 U. S. C. App., Supp. V, 1291), and was not

[3] War Shipping Administration General Order No. 32, April 22, 1943; 8 Fed. Reg. 5414; 46 C. F. R., 1943 Cum. Supp., p. 11359, secs. 304.20–304.29.

allowed (R. 13). The amount of the fine of $200.00 was withheld from petitioner's wages by respondent Grace Line, Inc., as agent for the United States (R. 13). Subsequently, on November 16, 1943, petitioner without protest accepted payment by respondent of the balance of his wages less the amount of the fine (R. 13).

ARGUMENT

Petitioner, a civil service seaman employed on a War Shipping Administration vessel [4] who was convicted of theft by an Army court martial, brought this suit to contest the withholding of $200.00 of his wages in payment of his unpaid fine. The issue thus raised was presented to the district court on an agreed statement of facts which expressly stipulated that petitioner was employed by the United States (R. 10). Petitioner's counsel, in presenting the case to the district judge, specifically conceded that "the United States was the creditor and operator of the vessel" (R. 36). The court below, reversing the judgment of the district court, held that the United States, as employer, could not lawfully withhold any part of petitioner's wages

[4] Employment on a government-owned vessel operated by the War Shipping Administration as successor to the Maritime Commission made petitioner an unclassified civil service employee of the United States. Civil Service Rules, Schedule A, sec. xxi (1), Executive Order No. 9004, 7 F. R. 2; Executive Order No. 9247, 7 F. R. 837; 5 C. F. R., 1943 Cum. Supp., p. 1488, sec. 50.21.

by reason of the fine (R. 53–57). The Government will not apply for certiorari to review this action of the court below and payment of the judgment will be made in due course. Payment will, of course, extinguish petitioner's cause of action. *Little* v. *Bowers,* 134 U. S. 547, 557–559; *Dakota County* v. *Glidden,* 113 U. S. 222, 225; cf. *Pease* v. *Rathbun-Jones Eng. Co.,* 243 U. S. 273, 281.

1. The heart of petitioner's contention here is that the court below erred in failing to find that the equivalent of an "employer-employee" relationship existed between himself and respondent Grace Line, the Government's agent (Pet. 4–5, 11, 12, 14). Petitioner repeatedly characterizes Grace Line as the operator of the *Whitney* and even asserts that the United States so conceded (Pet. 2, 3, 9, 25). Without regard to the fact that these supporting assertions by petitioner are contrary to the record, we submit that petitioner lacks standing to press the question raised by his petition. Petitioner has judgment against the United States, payment of which will be made in due course, and he cannot suggest financial unreliability of the Government. Under this Court's decisions, petitioner, the successful party in the court below, cannot here "* * * complain that it is aggrieved by its own success * * *." *New Orleans* v. *Emsheimer,* 181 U. S. 153, 154; Robertson and Kirkham, *Jurisdiction of the Supreme Court,* pp. 526–527. The petition

for certiorari, in recognition of this lack of standing, states that many seamen have brought contract suits against the Government's agents which, if dismissed, might be barred as to the Government by the two-year limitation statute (Pet. 2). This assertion is not in accord with the records of the Department of Justice. Our records indicate that relatively few seamen have omitted to sue the United States even in those instances where they have brought suit against the agent of the Government.[5] But assuming the existence for other cases of the statute of limitations question relied on by the petition herein, no such question is presented by this case. And we believe it well settled that the petitioner cannot obtain standing herein by asking this Court "* * * to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it * * *." *Tyler* v. *Judges of Court of Registration,* 179 U. S. 405, 409; Robertson and Kirkham, *supra,* pp. 478–484. If, as petitioner contends, the statute of limitations point is important in other cases, "* * * so much the more important is

[5] Suits by Government seamen are under the supervision of the Admiralty and Shipping Section of the Department and reports are received in respect of suits against agents as well as those against the United States itself. Pursuant to the agency agreement, the United States is obligated for any recovery effected and defense of such actions is undertaken by the Department of Justice whenever requested by the Maritime Commission.

it that it should not be decided in a case where there is nothing in dispute * * *." *Little* v. *Bowers,* 134 U. S. at 558. We accordingly submit that petitioner's application for certiorari is no more than a request for an advisory opinion by this Court, a type of request which has been traditionally declined. *Coffman* v. *Breeze Corporations,* 323 U. S. 316, 324–325.

2. Petitioner urges that a reversal of the judgment below is compelled by the reasoning which motivated the majority opinion of this Court in *Hust* v. *Moore-McCormack Lines, Inc.,* 328 U. S. 707 (Pet. 2, 14). Petitioner argues that in that case this Court established that the common law rules of principal and agent, which regulate the liability to third parties of the agent of a disclosed principal,[6] have no application when the disclosed principal is the United States (Pet. 12–14). In support of this argument, petitioner cites the language of the majority opinion in the *Hust* case (328 U. S. at 719) that the decision there "is equally applicable to all other maritime rights

[6] See 1 Labatt, *Master and Servant* (1913), pp. 102–103: "It is well settled that, where an employee, acting under the express or implied authority of his principal, engages servants to perform work for the benefit of his employer, the principal, and not the employee, is in law the master of the servants so engaged. This doctrine is an obvious and necessary consequence of the fact that, in the case supposed, the power of controlling the servants, even though it may normally be exercised by the agent after they are hired, really resides in the principal, and may at any time be called into active exercise." Cf. *Restatement of Agency,* § 79, comment (a).

and remedies dependent upon existence of the 'employer-employee' relation" (Pet. 13). He concludes that this Court thereby intended that seamen are to be deemed the employees of the "operating agent" (Pet. 14), and implies that respondent Grace Line is an "operating agent."

Assuming petitioner's standing to raise this question, the inapplicability of his argument to this case is apparent. Unlike the situation presented by the record in the *Hust* case, where the answer of Moore-McCormack admitted that it was the operator of the vessel (October Term, 1945, No. 625, R. 6), and that concession was accepted by the majority of this Court (see 328 U. S. at 717, 718, 720, 721, 724, 727, 730, 732), here the record shows respondent was not operating the vessel. Respondents' answer denied that Grace Line owned, operated or controlled the vessel (R. 6). Petitioner conceded in the trial court that the United States was operator of the vessel (R. 36) and the Agreed Statement of Facts expressly states respondent Grace Line's relation was only that it "attended to the business of said vessel in accordance with the terms of the General Agency Agreement" in the standard form GAA 4-4-42 (R. 10, 15).[1] The agreed statement further stipulated that petitioner "was employed by the United States" as a seaman aboard the *Whit-*

[1] War Shipping Administration Form GAA 4-4-42, 7 Fed. Reg. 7561; 46 C. F. R., 1943 Cum. Supp., p. 11427, sec. 306.44.

ney (R. 10).[8] We submit that, on these facts, respondent Grace Line's status is fixed by the decision in *Caldarola* v. *Eckert*, 332 U. S. 155, where this Court held that the ship's husbands or general agents employed by the United States to manage the accounting and other business operations of its vessels in acordance with the standard form GAA 4–4–42 agreement do not thereby become the owners *pro hac vice* or operators of Government vessels. They are not, as had been conceded in *Hust*, the "operating agents."[9]

Thus, the essential problem presented by the effect of the GAA 4–4–42 agreement on the rights

[8] Petitioner's statement that the question here is whether a seaman employed on a vessel operated by a private steamship company may sue the company (Pet. 3) and his assertions that it was conceded that the vessel was operated by respondent Grace Line (Pet. 2, 9) disregard the record. See *supra*, p. 6.

[9] It is not true, as petitioner implies (Pet. 13), that general agents serving the Government under GAA 4–4–42 performed the same functions as private shipping companies operating their own ships or operating Government vessels formerly demised to them for operation under "operating agreements" as in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, or "bareboat charters" as in *Carroll* v. *United States*, 133 F. 2d 690 (C. C. A. 2). On the contrary, their authority stops at the water's edge for they are mere ship's husbands or agents to manage the accounting and certain classes of shoreside business operations of the Government's vessels. See letter of the General Counsel, U. S. Maritime Commission, to Assistant Attorney General Sonnett, Reply Brief for Respondent Thor Eckert & Co., *Caldarola* v. *Eckert*, No. 625, Oct. T., 1946, Appendix, pp. 43–66. Operation of the vessels themselves is directly by the United States and it is expressly

of seamen employed by the United States aboard its vessels has been fully explored so far as the needs of this case are concerned. The statutes and the general maritime law [10] alike place liability for wages exclusively upon the master and the operating owner or owner *pro hac vice*. Never has it been suggested that liability for wages also rested upon the ship's husband. The rights of the seaman to recover his wages are expressly provided in Title 46 of the Code. The seaman may recover wages from the master and owner whether or not the vessel earns freight. 46 U. S. C. 592. If the seaman is discharged without his fault or consent, the discharge is deemed wrongful and he recovers from the master or owner his earned wages and one month's additional wages as a sort of liquidated damages.

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provided that "the Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel" and "the officers and members of the crew shall be subject only to the orders of the Master" and not of any other Government agent (Art. 3A (d) of GAA 4–4–42).

[10] It is settled that the seaman has "a threefold remedy for his wages, against the master, the owner, or the ship, and may proceed, at his election, against either of the three in admiralty or against the master or the owner at common law." See *Temple* v. *Turner*, 123 Mass. 125, 128; *Bishop* v. *Shepherd*, 23 Pick. (Mass.) 492, 495–496. And see *Everett* v. *United States*, 277 Fed. 256, 258 (W. D. Wash.), affirmed, 284 Fed. 203 (C. C. A. 9), certiorari denied, 261 U. S. 615; *The A. Heaton*, 43 Fed. 592, 595 (C. C. D. Mass.); (*Bronde* v. *Haven*, 4 Fed. Cas. No. 1924 at p. 212 (E. D. Pa.); *Conlon* v. *Hammond Shipping Co.*, 55 F. Supp. 635 (N. D. Cal.).

46 U. S. C. 594. If upon discharge, payment of a seaman's wages is delayed without reasonable cause, the seaman may recover from the master or owner his earned wages and a penalty of two days' pay for each day's delay. 46 U. S. C. 596. No advance of wages may be paid nor any allotment made except as provided by statute, and if paid, will not absolve the master or owner from full payment of wages when earned. 46 U. S. C. 599.

We submit that it is thus clear that respondent Grace Line, as ship's husband, had no liability to petitioner on his wage claim herein. Nor can it be successfully contended that the decision below did not result from a proper consideration of the War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45 (50 U. S. C. App., Supp. V, 1291). As this Court held in the *Hust* case, the purpose of the Clarification Act was to assure both prospectively and retrospectively that seamen on all vessels controlled by the Government should have the right to sue the United States under the Suits in Admiralty Act, 1920 (41 Stat. 525; 46 U. S. C. 741 *et seq.*) and incidentally to preserve such other rights as they might have. 328 U. S. at 726, 727, 729. The Act did not give seamen employed by the United States on its vessels a new right against government agents who are not "operating agents" but only ships' husbands or "general agents" employed to manage the accounting and other shoreside business of the Government's vessels.

3. For the reasons set forth above, we submit that petitioner has no standing with regard to the question which he seeks to raise, and that, in any event, that question was correctly resolved by the decision below. Petitioner's position gains no strength by his assertion of a conflict between the decision below and *Aird* v. *Weyerhaeuser S. S. Co.*, 1947 A. M. C. 1503 (C. C. A. 3), decided September 16, 1947 (Pet. 16). The *Aird* case has been ordered for rehearing before the Third Circuit Court of Appeals *in banc*. That case was, of course, called to the attention of the court below by the parties prior to the decision herein. The *Warren* case, referred to by petitioner (Pet. 16–17), was reargued before District Judge Medina following the decision herein, and is presently pending before him.

The other cases in the lower state and federal courts cited by petitioner present a number of divergent situations as to all of which it can scarcely be expected that a decision of this case will be received as dispositive. Whether in any pending case where recovery is allowed against the agents the United States will authorize payment or direct that further proceedings be had cannot now be determined.[11]

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[11] Of the other cases to which petitioner refers (Pet. 20–21), the *Martinez*, *Gaynor*, *Fink*, and *Healy* cases are now pending on appeal. In the *Saluk* and *Cohen* cases, payment was authorized on the ground that the equities and the amounts involved did not justify further proceedings, since other cases involving similar questions were pending.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Acting Assistant Attorney General.

SAMUEL D. SLADE,
LEAVENWORTH COLBY,
Attorneys.

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